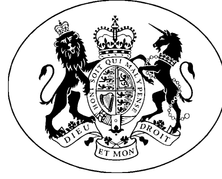

EMPLOYMENT TRIBUNALS

Claimant: Ms S Macken

Respondent: BNP Paris London Branch

Heard at: London Central (via CVP) **On:** 12 and 13 September 2024

Before: Employment Judge Davidson

Appearances
For the claimant: Ms S Aly, Counsel
For the respondent: Mr J Laddie KC, Counsel

PRELIMINARY HEARING IN PUBLIC JUDGMENT

1. **The following complaints are struck out pursuant to Rule 37(1) (a) of the ET Rules on the basis that they are scandalous vexatious or have no reasonable prospect of success because they are an abuse of process:**

    1.1. **Direct sex discrimination**

    1.2. **Direct disability discrimination**

    1.3. **Equal pay**

    1.4. **Indirect disability discrimination**

    1.5. **Failure to make reasonable adjustments**

    1.6. **Unlawful deduction from wages;**

    1.7. **Whistleblowing detriment and victimisation relating to the following:**

1.7.1. failing to implement the spirit of the Remedy Judgment that future salary reviews should be adjusted for inflation and pay rises should reflect her male comparators;
1.7.2. not including the claimant in the 'standard' salary review process;
1.7.3. capping the claimant's base salary at 5% per annum
1.7.4. freezing the claimant's salary for the purpose of calculating holiday pay top up
1.7.5. not awarding long-service extra holiday entitlement;
1.7.6. not allowing the claimant to buy or sell holiday entitlement;
1.7.7. underpayment of holiday pay top up payments;
1.7.8. underpayment of employer pension contributions.

2. Alternatively, these complaints are struck out pursuant to Rule 37(1) (a) of the ET Rules on the basis that they have no reasonable prospect of success.

3. The complaint of whistleblowing detriment and victimisation related to the incident on 22 October 2019 is struck out pursuant to Rule 37(1) (a) of the ET Rules on the basis that it is scandalous vexatious or has no reasonable prospect of success because it is an abuse of process.

4. Alternatively, this complaint is struck out pursuant to Rule 37(1) (a) of the ET Rules on the basis that the claimant has no reasonable prospect of success of showing that they were brought within the relevant time limits.

REASONS

Background

1. The claimant is employed by the respondent and is currently not able to work due to ill-health. She is receiving long-term ill-health payments under a permanent health insurance scheme, known as the Group Income Protection Scheme (GIP). She has been in the scheme since 1 February 2019. Under the terms of the scheme, she receives 70% of the base salary she was receiving at the date she entered the scheme, excluding any bonus or other benefits. This amount is increased by the equivalent of the Retail Prices Index (RPI) each year, subject to a cap of 5%.

2. In 2018, the claimant brought claims of equal pay, sex discrimination and victimisation. In August 2019 the tribunal found that she had been discriminated against due to her sex in relation to pay and benefits and that she had been victimised for raising complaints (Liability Judgment).

3. A Remedy Hearing was held in 2021 at which the claimant was awarded just over £2m. This included the sum of £857,044.11 in respect of future earnings. This amount represents the difference between the amount she will receive under the GIP scheme (which partially mitigates her loss) (Actual Earnings) and the total amount she would

have received if she had stayed in employment until retirement age (Predicted Earnings). In effect, the tribunal's award for future loss reflects the 30% of base salary not paid under the GIP scheme as well as losses relating to those elements of pay not included in base salary, in particular bonus. Holiday pay was not taken into account in the Remedy Judgment.

4. At the time of the remedy judgment, the claimant had been in the GIP scheme for over two years. The assumption was made that she would continue to be in the scheme until her retirement age. Even if she was able to work in future, it was found to be unlikely that she would be able to earn as much as the GIP scheme was paying her.

5. In January 2024, the claimant lodged a new claim against the respondent. The new claim contained complaints of equal pay, direct sex discrimination, direct disability discrimination, indirect disability discrimination, failure to make reasonable adjustments, victimisation, whistleblowing detriment and unlawful deductions from wages.

6. This hearing is to consider the respondent's application for a strike out of part of the claim. The application comprises five sections. In summary, the strike out application is made in respect of the claims set out below on the basis that pursuing these claims is an abuse of process and, alternatively, that the claims have no reasonable prospect of success. There is also an application, in the alternative, for a deposit order to be made in respect of those claims on the grounds that they have little reasonable prospect of success. In respect of a claim relating to an incident in October 2019, the application is that the claim is an abuse of process and, alternatively, that there is no reasonable prospect of the claim being found to be within time.

7. The respondent has categorised the claimant's claims as follows:

    7.1. '*RPI claim*' – this is a complaint about the salary element under the GIP scheme being increased by a maximum of 5% even if the RPI rate is above that, whereas active employees have no cap to their salary increases. The RPI claim is brought as equal pay, direct sex and disability discrimination, indirect disability discrimination, whistleblowing detriment, victimisation, failure to make reasonable adjustments and unlawful deductions from wages.

    7.2. '*Salary review claim*' – this relates to the claimant's exclusion from the annual salary review that active employees are entitled to. Her salary increases are limited to the increases provided within the terms of the GIP scheme. The salary review claim is brought as direct sex and disability discrimination, indirect disability discrimination, whistleblowing detriment and victimisation.

    7.3. '*Holiday pay claims*' – the claimant's salary at the time she entered the GIP scheme is frozen for the purposes of Holiday Pay Top Up 'HPTU'. HPTU is a benefit under the scheme where the respondent pays statutory holiday entitlement to employees in the GIP scheme based on their actual salary when they entered

the scheme. This equates to the difference between the frozen salary and the 70% paid under the GIP scheme. As the GIP payment increases over time, the difference between that payment and the frozen salary reduces, eventually to nil.

7.4. The claimant's contract of employment includes the benefit of holiday increments for long service of 2 days after 5 years and a further 2 days after 10 years. The contract also provides that these increments are removed if an employee is absent from work for more than one month. GIP recipients do not receive this benefit.

7.5. Active employees can buy and sell holiday entitlement, but they can only sell holiday if their entitlement in excess of statutory holiday entitlement. This scheme is not open to employees receiving GIP benefits as the HPTU is based on statutory minimum entitlement.

7.6. The holiday pay claims relate to

7.6.1. the failure to award two days additional holiday for 5 and 10 years accrued service, which is a benefit given to active employees,
7.6.2. refusal to allow employees in the GIP scheme the opportunity to sell holiday in the buy/sell holiday scheme, and
7.6.3. the exclusion of bonus payments from the HPTU calculation.

7.7. The holiday pay claims are brought as direct sex and disability discrimination, indirect disability discrimination, whistleblowing detriment, victimisation, failure to make reasonable adjustments and unlawful deductions from wages.

7.8. '*October 2019 claim*' – this is a claim arising out of an incident at a business-related social event where a member of the respondent's legal team approached the claimant. The October 2019 claim is brought as whistleblowing detriment and victimisation.

8. The following claims brought by the claimant are <u>not</u> the subject of this application and will go forward to a final hearing:

8.1. Failure to run a grievance and appeal procedure
8.2. Failure to follow the new control procedures to ensure a fair grievance process
8.3. Failure to run a whistleblowing procedure
8.4. Ignoring the claimant's concerns and requests for reasonable adjustments
8.5. Failing to respond to the claimant's email dated 6 November 2023
8.6. Trying to cover up the discrimination via a sham private investigation.

9. The claimant resists the respondent's application and contends that all her claims should be heard at a full hearing. She cites the established cases which provide that discrimination cases should not generally be struck out without evidence being heard.

<u>Preliminary question</u>

10. Many of the claimant's submissions are based on the allegation that the respondent has failed to comply with paragraph 283 of the Remedy Judgment. The respondent disputes this. It would be helpful to consider this issue as a preliminary question as follows: what does paragraph 283 provide? Has the respondent failed to comply? Does the claimant have a legitimate expectation that she will receive uncapped RPI increases to her GIP salary?

11. The relevant extracts from the Remedy Judgment are as follows:

> *28 The Claimant continues to be an employee of the Respondent. She has not worked since July 2018, however, having been on long term sick leave since then. She received full pay for the first six months of her absence.*
>
> *29 From 1 February 2019, the Claimant has been receiving her salary by way of a benefit under the Respondent's Group Income Protection (GIP) Scheme. We deal in more detail with the Scheme below, but for now note that the basic entitlement under the scheme is to 70% of base salary. In addition, recipients of the benefit under the scheme receive an annual percentage increase based on RPI. Such schemes are commonly referred to as PHI schemes and when we use that term in this judgment, we are referring to the GIP Scheme.*
>
> *86 As noted above, under the scheme employees of the Respondent receive 70% of their Insured Salary. The Insured Salary is base salary and excludes other elements of pay such as Special Allowances and bonuses. The scheme also pays the employer national insurance contributions for the relevant employee and the employer pension contributions. Recipients of the benefit receive an annual increase for RPI each year in April, subject to a maximum increase of 5% per annum and can remain in receipt of the benefit until their 65th birthday.*
>
> *268 The existence of the PHI scheme ensures that we do have an appropriate degree of certainty to undertake a reasoned calculation.*
>
> *282 It is possible to calculate the Claimant's future earnings under the PHI scheme with a high degree of accuracy. The Claimant's earnings under the PHI scheme will continue up to the age of 65.*
>
> *283 The benefit will continue to be based on the reference salary of £160,000. The Claimant will receive an annual increase for RPI*

> *each year. The only unknown is the rate of RPI as this is determined annually based on the most recent published figure as at the time of the increase, which is April each year. The value of RPI the last 10 years has varied between 0.5% and 5%. We have decided that an appropriate amount is 1.5% for the financial year 2021 to 2022 and 2.5% thereafter.*

12. The claimant contends that paragraph 283, specifically, the sentence '*The Claimant will receive an annual increase for RPI each year*' confers an entitlement to an annual increase based on the actual RPI, uncapped, and if the GIP does not provide this level of increase, it is up to the respondent to make up the shortfall.

13. I do not agree with that reading of paragraph 283. The tribunal was aware of the 5% cap (see paragraph 86). In addition, paragraph 283 itself discusses the fact that the rate of RPI is unknown and determines the amount it considers is appropriate to apply, being 1.5% for 2021 and 2022 and 2.5% thereafter. In my view, the tribunal judgment does not override the 5% cap simply because it fails to repeat the information set out earlier in the judgment. I read the reference to the 'annual increase for RPI each year' as shorthand for the description of the scheme set out in paragraph 86. Given the detailed analysis of the principles and workings applied to the remedy generally over a 73-page Judgment, I believe there would have been more detailed discussion of the issue if the Judgment was intended to incur this additional benefit beyond the rules of the scheme. If anything, by stipulating the amount as '2.5% thereafter', the tribunal has dealt with the RPI issue and made its finding.

14. In any event, I find that the point is otiose. The tribunal carried out detailed calculations in determining loss of future earnings which is reflected in that element of the award. These are set out in Appendix 1 of the Remedy Judgment. The Remedy Judgment determined Predicted Gross Earnings. These were not based on annual RPI increases but on the likely trajectory of the claimant had she remained an active employee, comparing her position to Comparator 1. On that basis, the claimant's future loss calculation assumed pay rises of 10% at year 5 and year 10.

15. The calculation of Future Losses took the Predicted Earnings for each year and subtracted Actual Earnings (the GIP pay) for that year. Each year until retirement age was added together to reach the total. The tribunal took the view that the fact that the claimant was in the GIP scheme allowed it to assess actual future earnings with some accuracy. If it is now to be argued that the amount of Actual Earnings should be greater than the tribunal allowed, then the corresponding award for future losses will need to be recalculated. In other words, if the amount deducted as Actual Earnings from the Predicted Earnings is increased, the figure for Lost Earnings will decrease. This will result in the same outcome. It is hard to see what the claimant would achieve even if her GIP earnings increased as this would not change the total amount due to her as set out in the Remedy Judgment.

16. The claimant also relies on the 'spirit' of the Remedy Judgment. As set out above, I find that the tribunal has not made a ruling that actual RPI must be applied and there is nothing in the Judgment to suggest that this is what the tribunal intended to do so. Representations referring to the 'spirit' of the Judgment do not, in my mind, assist the claimant.

Application 1 – abuse of process

17. The respondent contends that the claims of direct sex/disability discrimination, breach of the sex equality clause, indirect disability discrimination, failure to make reasonable adjustments and some of the whistleblowing detriment/victimisation claims should be struck out pursuant to Rule 37(1)(a) of the ET Rules on the basis that they are either scandalous, vexatious or have no reasonable prospects of success because they are an abuse of process.

Respondent's submissions

18. The respondent relies on the rule in *Henderson v Henderson* (1843) 3 Hare 100 as authority that parties in litigation must bring forward their whole case and not re-open litigation to deal with new matters which could have been dealt with in the earlier litigation.

19. The matters now complained of by the claimant could have been raised at the Remedy Hearing. The circumstances of the difference in treatment between the claimant (in the GIP scheme) and Comparator 1 (in active employment) were known at the time. Similarly, any difference in treatment between those in receipt of GIP benefits and those in active employment were known at the time. If the claimant wanted to pursue claims of discrimination relating to her treatment going forward, she could have done so. Her failure to do so is covered by *Henderson v Henderson* and her current claim is therefore an abuse of process.

20. Her remedy claim has been determined. It is irrelevant that she now relies on different causes of action. The exercise in calculating her loss has been completed and cannot be reopened.

21. The reliance on an unpredicted increase in RPI is not a valid reason to make further claims against the respondent. The underlying notion of the claim is, in any event, fallacious because the claimant's supposed comparator (employee in active employment) does not receive RPI increases. The claimant has been compensated by the respondent in accordance with the Remedy Judgment.

22. In relation to the holiday pay claims, it is accepted that holiday pay did not form part of the Remedy Judgment. However, the principles relating to calculation of HPTU and the exclusion of the long-service holiday benefit and the buy/sell scheme were known to the claimant at the time of the Remedy Hearing. Even if these were not part of her original claim, they could have been part of her submissions at the Remedy Hearing.

Her failure to bring this up at the Remedy Hearing, for whatever reason, means that she cannot bring it up subsequently.

23. The reason the claimant is dissatisfied with the remedy outcome is that the economic circumstances have changed since 2021. This is not a valid reason for revisiting the Remedy Judgment or for bringing new claims arising out of the same circumstances, where those circumstances were known to the claimant at the time of the Remedy Hearing. Bringing these claims is an abuse of process and they should be struck out.

Claimant's submissions

24. The claimant contends that *Henderson v Henderson* is not rigid and should be applied with flexibility.

25. She is bringing the current claim due to the respondent's failure to comply with the Remedy Judgment. She is not bringing enforcement proceedings (which would be a High Court claim) but is alleging discrimination and detriment arising from her ongoing treatment.

26. The tribunal must take into account the claimant's ill health at the time of the Remedy Hearing and the fact she had COVID for a long time.

27. Although she was in the GIP scheme from February 2019 and was in the scheme at the time of the Remedy Hearing, she was not fully aware of how the scheme worked.

28. The claimant contends that the respondent's practices and her ongoing treatment are discriminatory, and these allegations should be considered by a tribunal at a full hearing.

29. The special circumstances which are relevant to this case are that the respondent caused the claimant's injury leading to her long-term absence and the respondent has a poor history of compliance with orders and disclosure of documents.

30. The claimant's case is a special situation due to the change in economic circumstances leading to high inflation. These are complex points which should be looked at by a tribunal at a full hearing.

31. The respondent has the power to alter the rules of the GIP scheme and has used this power previously. This is a matter of evidence for a full hearing.

Relevant law

32. *Henderson v Henderson* 1843 3 Hare 100 established that parties to litigation must bring forward their whole case. They will not be permitted to bring fresh proceedings in a matter which could and should have been litigated in earlier proceedings, but was omitted through negligence, inadvertence or even accident. The Vice Chancellor's Court held that a court will not, except in special circumstances, permit the same

parties to open the same litigation in respect of a matter which should have been, but was not, presented as part of the original contest, because of negligence, inadvertence, or even accident. The plea of *res judicata* applied, except in special cases, not only to points which the court was actually required to decide, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

33. The relevant principles were reviewed and restated by the House of Lords in *Johnson v Gore Wood* 2001 2 WLR 72, where Lord Bingham said (at paragraph 31) that the court or tribunal must consider:

    33.1. whether in all the circumstances the bringing of proceedings is an abuse of process;

    33.2. the circumstances will include whether the proceedings are brought against the same defendant or respondent; whether the issue could, with reasonable diligence, have been discovered and raised in the previous proceedings; and whether the later action involves unjust harassment or oppression of the party sued.

34. Applying *Henderson v Henderson*, the House of Lords said in *Johnson v Gore Wood*:

> "*The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all*'.

35. The crucial question is whether the claimant is, in all the circumstances, misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before.

<u>Discussion</u>

RPI claim

36. In relation to the RPI claim, the claimant's contention that the respondent has failed to comply with the Judgment is misconceived for the reasons set out above. The issue of RPI increases was addressed by the Remedy tribunal and it made a finding that 2.5% would be applied for future years. As it happens, the claimant has received higher increases than 2.5%, thus giving her a windfall.

37. The claimant accepts she was in receipt of PHI benefits under the GIP scheme at the time of the Remedy Hearing and had been aware of the rules of the scheme including the way that her payments would be calculated. There does not appear to be any reason why the discrimination arguments could not have been brought at the time of the Remedy Judgment. Even if the issue was not apparent prior to the Judgment, EJ Burns allowed the parties 60 days to request a reconsideration of the Judgment. The claimant did not raise the issue within that window.

38. In reaching the figure of 2.5% RPI increases going forward, the tribunal did what every court or tribunal does when assessing future loss. It made predictions and assumptions. It is inevitable that, in the fulness of time, some predictions and assumptions will prove to be incorrect but that is the nature of the litigation process and, in particular, assessments of future loss. The benefit can be in favour of one party or the other but when assumptions turn out to be incorrect, that is not a reason to revisit the original Judgment.

39. In any event, an increase in RPI above 5% is not an unpredictable event. There have been times in the past where RPI was above 5% and there was no reason to believe it would never happen again. It was therefore open to the claimant to make representations at the Remedy Hearing that the cap on RPI under the GIP scheme should be disapplied if RPI went above a certain amount. I find that it is not open to the claimant to react to an increase in RPI that she and the tribunal had not (but could have) predicted by reassessing her loss.

40. At the time of the Remedy Hearing, the claimant had been in the GIP scheme for two years. She was aware of its terms, as were the tribunal. I do not accept her submission that she could not have brought these claims at the time because she did not know how the GIP scheme worked.

Salary claim

41. At the time of the Remedy Hearing, the claimant was aware that her pay under the scheme would increase in accordance with the rules of the scheme and she would not be treated in the same way as active employees. In some respects, she was treated better with guaranteed salary increases but in other ways, less favourably as there is a cap on salary increases which does not apply to active employees. These were matters which could have formed part of the Remedy Hearing.

Holiday pay claims

42. The various matters complained of under the ‘holiday pay’ claims heading were all known about at the time of the Remedy Hearing. Neither party raised holiday pay and the tribunal did not address it. However, that does not permit the claimant to raise these issues at a later time if she could have raised them at the Remedy Hearing.

Conclusion

43. I find that the matters relied on by the claimant in her current claim were known about at the time of the Remedy Hearing and should have formed part of her representations at that hearing.

44. I have taken into account the claimant's submission that she was unwell at the time of the Remedy Hearing and that she had COVID for a long time. The claimant was represented at the Remedy Hearing by counsel and was able to make detailed submissions and participate in a lengthy hearing. I do not accept that the claimant's ill health explains the failure to advance the arguments she now seeks to bring at the Remedy Hearing.

45. She relies on the special situation caused by the prevailing economic changes. For the reasons set out above regarding finality in litigation, I do not agree that this is a special situation.

46. She also contends that it is a relevant factor that the ill-health which results in her no longer being an active employee was caused by the respondent's treatment of her. I do not accept this contention. The claimant has been compensated in the Remedy Judgment in respect of her personal injury. The reason why she is receiving GIP benefits is not relevant to assessing whether the scheme operates in a discriminatory way or whether the claimant has been singled out.

47. I therefore find that the claims should be struck out as they are either scandalous, vexatious or have no reasonable prospects of success because they are an abuse of process. With reasonable diligence, the claims outlined above could have been brought before the tribunal at the Remedy Hearing.

Application 2 – no reasonable prospect of success

48. Notwithstanding my decision in relation to Application 1, I will consider this application separately.

49. The respondent contends that the claims of direct sex/disability discrimination, breach of the sex equality clause, indirect disability discrimination, failure to make reasonable adjustments and some of the whistleblowing detriment/victimisation claims should be struck out pursuant to Rule 37(1)(a) of the ET Rules on the basis that they have no reasonable prospects of success.

Respondent's submissions

50. The background to this case is the claimant's successful claim against the respondent. However, that background is not relevant to her current disability discrimination claims. For the purpose of these claims, the reason why she is in the GIP scheme should not form part of the analysis as to whether the scheme is discriminatory.

51. The respondent accepts that there is a general reluctance to strike out discrimination claims without hearing evidence but contends that there are exceptions. These include situations where the facts are not in issue or if there is a structural or conceptual flaw in the case.

Claims requiring a comparator

52. The respondent relies on *Clifford v IBM UK Ltd* [2024] EAT 90 as authority for the proposition that an employee receiving long-term ill-health benefits because they are unable to work cannot compare themselves to an employee in active employment. The respondent accepts that the relevant parts of the EAT judgment are *obiter* but argues that the comments are persuasive and compelling. The relevant point is that the claimant's circumstances are materially different from an active employee and therefore the direct discrimination claim has no reasonable prospect of success.

53. Even if Comparator 1 was an appropriate comparator, his situation does not assist the claimant. The claimant, as a participant in the GIP scheme, receives annual pay increases subject to a cap for RPI. Comparator 1, as an active employee, does not have the right to an annual increase although, if his pay is increased, it is not subject to a cap for RPI. Comparator 1 is not an appropriate comparator as his circumstances are different but, in any event, his overall situation could potentially be less advantageous.

54. The respondent contends that the correct comparator for any direct discrimination claim by the claimant is another employee in the GIP scheme. The respondent says that the claimant has been treated in the same way as everyone else in the GIP scheme.

55. Her equal pay claim is also misconceived as 'equal work' requires a comparison to be drawn between the work done by the man and the work done by the woman. The claimant has not worked since 2019 and the payments she receives are because she is not working.

56. Her indirect disability discrimination claim makes no sense because the comparison should be with employees receiving GIP benefits who do not have a disability. The PCPs must apply to both groups in the comparison.

57. The claimant cannot show a relevant disadvantage for her indirect discrimination claim. She is only entitled to the GIP benefits because of her disability and she has not suffered any relevant disadvantage. It is not relevant that the benefits might have been more generous or calculated differently.

58. In relation to the failure to make reasonable adjustments claim, the PCPs pleaded by the claimant are vague.

Claims not requiring a comparator (whistleblowing detriment and victimisation)

59. The respondent's submissions take the claimant's position on protected disclosures and protected acts at its highest and its focus is on the detriments relied on by the claimant.

60. The claimant must show detriment and causation. These claims are inherently inconsistent with her other claims.

61. The respondent denies that the treatment said to amount to a detriment should properly be regarded as a detriment. The claimant is complaining that the GIP and HPTU arrangements are not more generous than they are. She accepts that she is being treated the same as others in the scheme. Her allegation that she is being singled out for treatment cannot succeed.

Unlawful deduction from wages

62. The claimant must show that she has a contractual entitlement to the sum she says has been deducted from her wages. The respondent challenges the position that payments under the GIP scheme and the HPTUs constitute wages for the purposes of the legislation. The GIP payments are paid by the third-party insurer, not by the employer.

63. Even if the GIP and HPTU payments are 'wages', the claimant must show that the amounts claimed are 'properly payable'. She is unable to do so as her claim relies on an interpretation of the reasons provided to support a tribunal Judgment, not even the Judgment itself.

64. The amounts the claimant receives by way of HPTU is a discretionary additional payment made by the respondent and constitutes a windfall for the claimant. It is calculated using basic salary only, excluding any bonus element. No employee has a holiday entitlement which includes their bonus element. The claimant cannot show that the holiday entitlement on which she bases her unlawful deductions claim is properly payable.

Claimant's submissions

65. There is a line of authorities that state that discrimination claims should not generally be struck out without hearing evidence as such claims need to be heard. In any strike out consideration, the claimant's claims must be taken at their highest.

Claims requiring a comparator

66. The claimant seeks to distinguish *Clifford* on the basis that Mr Clifford had waived his rights under a compromise agreement whereas she is in a GIP scheme with a tribunal judgment which identifies her comparator. Additionally, as conceded by the respondent, the passage relied on is *obiter*.

67. The claimant relies on her original comparator, Comparator 1. She should be in the same position as Comparator 1 going forward. It is not her choice to be an inactive employee. The respondent caused the claimant's injury, and it is not appropriate to compare her to an inactive employee.

68. The claimant relies on *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, a case relating to the correct PCP when looking at sickness absence procedures. The Court of Appeal held that if the PCP was the requirement for consistent attendance at work, this would put a disabled employee at a disadvantage. By analogy, in this case, because the disabled employee is more likely to be on GIP benefits, this leads to a disadvantage. To the extent that a comparator is needed, it should not be limited to inactive employees.

Claims not requiring a comparator (whistleblowing detriment and victimisation)

69. The claimant has made further protected disclosures and, as a result, has been subjected to detriment including the matters which are the subject of the strike out application and other matters which are going to a hearing.

70. The claimant maintains that she has reasonable prospects of succeeding in her detriment claims.

Unlawful deduction from wages

71. The claimant does not accept that her HPTU should be seen as a windfall. She wants to be compensated in the way that was intended by the tribunal. She is unable to work, not from her choice and her salary is declining in real terms. It is not appropriate to strike out this claim.

<u>The relevant law</u>

72. The threshold for striking out a claim for having no reasonable prospect of success is high. In *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330, the Court of Appeal held that it would only be in very exceptional cases that, where there are facts in dispute, the claim should be struck out without the evidence being tested. It is only if the claim discloses no arguable case in law that it should be struck out.

73. 'No reasonable prospect of success' does not mean the claim is likely to fail. It is a high test and there must be <u>no</u> reasonable prospect of success.

74. The claimant's case must ordinarily be taken at its highest and only in the clearest case should a discrimination case be struck out.

75. Section 23 of the Equality Act 2010 provides that there must be no material difference between the claimant and their comparator for the purposes of a direct or indirect discrimination claim.

76. Section 65 of the Equality Act 2010 provides that a claimant's work is like work with her comparator if their work is the same or broadly similar.

77. Section 19 of the Equality Act requires the PCP complained of to be applied to the claimant and to persons who do not share her characteristic (in this case, disability) and to put her at a particular disadvantage because of her disability.

78. Section 13 of the Employment Rights Act provides that an employer shall not make a deduction from wages of an employee by paying less than the total amount of wages properly payable to the employee by the employer.

<u>Discussion and conclusion</u>

79. The issue is whether the claimant has no reasonable prospect of succeeding in her claims. This is a high threshold, particularly in the context of discrimination claims. I cannot strike out any claims which need to have written or oral evidence in order to reach a reliable determination of the issue.

80. I note that the claims which are the subject of this application do not involve any disputes of fact and there are no conflicts of evidence which would need to be determined at a hearing.

Claims requiring a comparator

81. I find that the correct comparator for a direct discrimination claim is somebody whose circumstances are not materially different from the claimant's. I am persuaded by the reasoning in *Clifford v IBM* and conclude that Comparator 1 (or anyone in active employment) is not an appropriate comparator.

82. It is clear from the Remedy Judgment that Comparator 1 was relevant for the past losses and for determining future predicted earnings. The pay increases predicted for Comparator 1 have been incorporated in the calculation of Future Predicted Earnings. However, the Remedy Judgment is fixed. If Comparator 1 gets an additional unpredicted pay rise or, conversely, is made redundant in future, this does not affect the claimant's Remedy Judgment. It is not a dynamic document.

83. I find that the direct discrimination claims comparing treatment with an active employee are misconceived and have no reasonable prospect of success.

84. In relation to the claims involving group disadvantage, I find that the claimant must compare herself to employees in the GIP scheme who are not disabled. She has not made her claim on this basis and therefore there is no reasonable prospect of her succeeding in these claims.

Claims not requiring a comparator (whistleblowing detriment and victimisation)

85. The claimant accepts that she has been treated in the same way as all the other participants in the GIP scheme, and in accordance with its rules. This is inconsistent with her contention that she has been singled out for this treatment because of her protected disclosure and her protected acts.

86. Some of the detriments relied on, for example the allegation that the respondent failed to implement the spirit of the Remedy Judgment are misconceived for the reasons outlined above. I therefore conclude that there is no reasonable prospect of the claimant succeeding in these claims.

Unlawful deductions from wages

87. I find that it is, at least, arguable that the payments under the GIP scheme are wages and fall within section 27 of the Employment Rights Act 1996.

88. However, I find that there is little reasonable prospect of the claimant succeeding in showing that the holiday entitlements on which she bases her claims are payments properly payable to her. She is a member of the GIP scheme and has received payments due to her under that scheme. The claimant relies on an interpretation of the Remedy Judgment to support these claims. For the reasons set out above, I do not accept that her interpretation is valid.

89. The HTPU is a discretionary payment and the claimant cannot show any legal entitlement to it. The claimant has no contractual or other legal entitlement to the enhanced long-service holiday award as she is in the GIP scheme. Further, she has no contractual or other legal entitlement to have holiday pay based on salary plus bonus.

<u>Application 3 – little reasonable prospect of success</u>

90. In view of my conclusions on Application 2, I do not propose to deal with Application 3.

<u>Application 4 – October 2019 incident - abuse of process</u>

91. The claimant relies on an incident which took place in October 2019 as a whistleblowing detriment and act of victimisation.

92. On 19 December 2019, the claimant had included this incident as an alleged whistleblowing detriment in a draft application to amend her third claim (which she had lodged around the time of the Liability Hearing). She subsequently withdrew that allegation on 2 April 2020, so it has not been before the tribunal.

Respondent's submissions

93. The respondent contends that this was a matter that should have been pursued at an earlier stage. The claimant was aware of the potential claim, as evidenced by her draft amendment, and following the principle in *Henderson v Henderson*, she cannot be allowed to resuscitate it now as that would be an abuse of process.

Claimant's submission

94. The claimant explains that she withdrew the amendment at a time when she was engaged in discussions with the respondent for an amicable resolution. It remains an important issue for her and she now wishes the allegation to be dealt with.

Discussion and conclusion

95. I find that the claim could have been brought at the time of the Remedy Hearing. The claimant was aware of the matter she complains of and had drafted particulars of that claim. The fact that she withdrew the proposed amendment before the application to amend had been determined was a matter for her. If she changed her mind about pursuing this claim, she could have raised it at the Remedy Hearing. I therefore find that it is an abuse of process to bring this claim now.

Application 5 – October 2019 incident has no reasonable prospect of being found to be in time

96. Notwithstanding my decision in relation to Application 4, I will consider this application separately.

Respondent's submissions

97. The respondent contends that the allegation involves a single individual, who left the respondent's employment in 2021, and who has not been part of any of the claimant's other claims or allegations. It is therefore a one-off event, which took place nearly five years ago. The next incident complained of by the claimant is in 2023 and therefore it is unlikely that this will be regarded as part of a continuing act. If there is no continuing act, the claim is out of time.

98. For the whistleblowing detriment, the claimant will have to show that it was not reasonably practicable to present the claim in time. She will not be able to do this given that the allegation was part of an amended claim which was then withdrawn.

99. She will also struggle to show it would be just and equitable to extend time for the victimisation claim because the respondent will be severely prejudiced in attempting to defend an allegation which took place five years ago involving an individual who left in 2021. The individual concerned will also be prejudiced as she has not been party to any other aspect of this case. On the claimant's side, she is only claiming injury to

feelings (for which she has been compensated in respect of other matters) so it is contended that the prejudice to her is less than the prejudice to the respondent.

Claimant's submissions

100. The claimant's position is that this is another event in a continuing series of general discriminatory conduct and treatment. It was an event which had a profound effect on the claimant. The 2019 incident is not an isolated act but part of a continuing pattern of detriment and discrimination which continued until the Remedy Hearing. The other matters within that pattern have been the subject of litigation at the Liability Hearing which is why they are not part of this claim

101. In considering whether to allow the victimisation claim to be submitted out of time, the tribunal must weigh up the prejudice to both parties. The claimant maintains that the prejudice to the respondent would be minimal in having to defend this claim compared to the upset to the claimant if it could not be pursued. It would be just and equitable to extend time for the victimisation allegation. The claimant was unwell at the time. The claimant will argue that it was not reasonably practicable for her to present the whistleblowing detriment claim due to her illness discouraging her from pursuing the claim.

102. The claimant is entitled to adduce and hear oral evidence regarding the incident and for the motivation to be explored. This can only happen at a full hearing.

Discussion and conclusion

103. I find that there is no reasonable prospect of the claimant showing that the October 2019 incident is part of a continuing act. The claimant accepts it involves an individual who is not part of the claim in any other way. The conduct complained of is not alleged to be part of other similar conduct.

104. I find that there is no reasonable prospect of the claimant showing that it was not reasonably practicable to pursue this claim within the statutory time limit relevant for whistleblowing detriment claims. She did, in fact, articulate this claim and proposed it as part of an amendment application. She then withdrew the application in respect of this allegation. There was no impediment to her bringing the claim, she decided not to pursue it.

105. In terms of the victimisation claim, I find that there is no reasonable prospect of the tribunal finding it would be just and equitable to allow the victimisation claim to be allowed in out of time. The prejudice to the respondent is significant in having to defend a claim going back five years and, in particular, there is prejudice to the individual involved who has not been part of this claim in any other context and who has moved on from the respondent. On the other hand, the prejudice to the claimant is minimal as she has had most of her claims heard, upheld and subject to a Remedy Judgment. It is hard to see what additional remedy she requires from this incident.

106. I conclude that there is no reasonable prospect of the claimant showing that this claim is within time. I therefore strike it out on that basis.

Employment Judge Davidson
30 September 2024

Sent to the parties on:

15 October 2024
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For the Tribunal Office:

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